ADR, Litigation, and Planning

ADR versus litigation. Any party considering litigation should consider ADR after discussing both avenues with counsel. An Executive Order and the policies of many agencies (including the Corps of Engineers) encourage its use. Among the most important issues to consider when faced with a choice between litigation and ADR are:

Are there persons from each potential entity in the conflict who can participate in the ADR process and who have the authority to make commitments for that entity?

Can the issue be resolved independently, without resolution of a larger, overarching dispute?

Is resolution of the issue on the facts acceptable, without the establishment of a precedent that clarifies a point of law?

Is there a mechanism available to enforce or implement a decision reached through ADR?

Can the dispute be resolved without endangering the parties needs for confidentiality?

If the answer to any of these questions is "no", disputants may prefer to litigate, or to take remedial action so that the answer can be "yes".

ADR and planning. Some elements of alternative dispute resolution (ADR) techniques are synonymous with good planning and evaluation, such as the development of clearly stated objectives, openness to alternatives, and the use of defensible, replicable evaluation procedures. But sometimes conflicts can prevent planning from taking place or being effective. Conflicts in a planning study can be over human relationships, political power, data, interests, values, and elements of the study structure itself (such as time, institutions, unequal control or geographic balance). ADR experts can help in a planning study if:

decision makers or important stakeholders have not invested authority with the Planning process, that is, have not agreed to accept the outcomes from the Planning process.

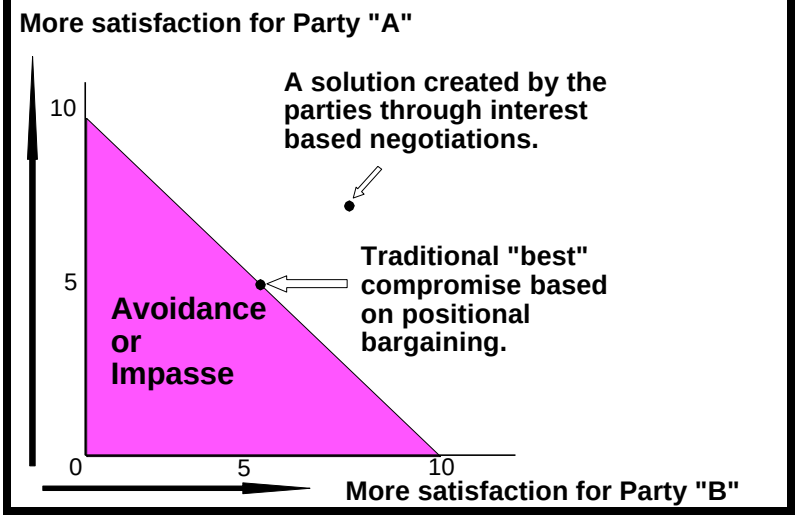
there are conflicts among study participants not related to the study issues.

interpersonal working relationships and communications are ineffective.

there is a rigid adherence to a specific rational-analytic framework that does not identify or address underlying needs.

In addition, ADR experts can work with planners when study conflicts are aggravated by human factors. For example, a team member used to gathering and analyzing data may try to make data gathering the whole of the study, and that person's technical prowess may divert team members from designing a study that will achieve the planning objectives. ADR experts

Interest vs position based bargaining



can work with planners to find ways to define an appropriate scope for data gathering while preserving the commitment of the data analyst to the study process.

Perhaps as important as the body of research and case studies, ADR experts can bring to a Planning the human skills for which ADR professionals are noted. Just as the engineering profession is associated with pragmatism and mathematical proficiency, ADR professionals often have a special capacity (enhanced by education and training) for effective listening, direct expression, and insight into the ways personalities affect study processes.

Getting to the table

Good water resources planning and management practice demands collaborative decision making and the sharing of information among four primary stakeholder groups: water users, water managers, advocacy groups, and others with special interests not included in the first three groups. If an important stakeholder boycotts the planning process, the process will not be effective. Hence, the most important ADR contribution to a drought study process may be getting stakeholders groups "to the table." A stakeholder that has dominant legal rights to water use, or that has the staff and funding to control water management information may believe that negotiation can only *reduce* their standing, and may refuse to be involved in a planning study, or worse, *pretend* to be committed to the process. This is a demonstration of rational self-interest, no different in kind than a refusal to accept a "heads you lose, tails you lose" gamble. The impasse can only be broken if it can be demonstrated that there is a potential for the reluctant participant to gain from participation.

Referring to the diagram shown on the left, there are two general types of situations in which a stakeholder group can *mistakenly* assume that negotiating offers no opportunity for improving its position:

1. *When the stakeholder considers only the outcomes offered by positional bargaining* (solutions within the shaded triangle). In drought, positional bargaining is often tied to the quantity of water a stakeholder will receive when water is in short supply. However, bargainers should consider why the water is needed and how a refusal to participate in a planning study will affect

the reluctant participant in areas not directly related to the planning study. For example, if the reluctant stakeholder uses water to make profit, the stakeholder could be given an opportunity to sell water at a profit in a water market. Indirectly related issues include the possibility of negotiation among the same groups on non-water issues, or a reduction in water management costs.

2. *When the stakeholder overlooks the possibility that its current advantage could be taken from it* (the figure above could be redrawn by a third party over the objections of the stakeholder, creating a "compromise" at a lower degree of satisfaction for the stakeholder). That was one of the most important lessons learned in the 1987-1992 California drought: droughts can rearrange what was thought to be a stable balance of power in a regional water setting. Although many western water experts believed that appropriation law and water contracts guaranteed farmers a certain allocation of water during drought, they failed to consider the public pressure to change *collective choice* allocation rules if those rules do not seem to serve the public.

It may be true that the reluctant stakeholder has correctly assessed the situation or cannot be persuaded to disbelieve its incorrect assessment. Planning study teams confronted with the refusal of an important stakeholder to participate should consider ending the study or decreasing its scope to preclude the need for involvement of the reluctant participant. To continue when there is no indication that the stakeholder will participate may be a waste of time and money, and may sour other participants on the concept of collaborative planning. A joint and public decision by other stakeholders to end a planning study may persuade the "pretend" participant to truly engage in the study process.

ADR and the Shared Vision Model

Shared vision models are a first attempt at creating a collective consciousness, where abstractions are all included, remembered in every evaluation, and are on display for every one to examine. A shared vision model can generally be as expert in each abstraction as each person can make it, and it insists on including each abstraction in every evaluation it produces. Hence, all are assured that they are important and that their knowledge and concerns are connected to decisions.

A shared vision model is not just a combination of hardware and software; not just new tool for manipulating data in creative ways. A shared vision model is also a PROCESS for dispute resolution. It can entice stakeholders to the table, but it also enhances the opportunity for moving through the stages of dispute resolution to a durable and implementable agreement. If the shared vision modeling process is used in combination with facilitation in a workshop setting, such as in a "Virtual Drought", the results can be exceptionally powerful in forging consensus on drought contingency plans.

The first agreement in the dispute resolution process is reached when people come together and have a look. The second stage of dispute resolution is what is often called "building a shared intent" to solve the problem. This is not as easy as it sounds. People can assemble for a problem solving exercise and then withhold or distort information, resist communication and negotiation, and mistrust others in the group. The role of the workshop facilitator at this point is to prod the

participants, probing the reasons for resistance and lack of trust, working through past history and issues of turf, status and competition.

The role of a shared vision model as a dispute resolution partner, and one of the keys to its power as a public consultation and negotiation tool, is its ability to assimilate and display the expert knowledge each stakeholder adds during the model building process. In the early shared vision planning studies, a three stage model building process was used to build trust in the model. First, each stakeholder group was interviewed, and portions of the model were built that pertained to the outputs and values of interest to them. These interviews also gave them an opportunity to see other parts of the model. Second, a joint workshop was held, and a series of exercises was used to determine if the model replicated behavior of the *system* well and understandably. Finally, the model was used in evaluating alternatives and virtual droughts, which allowed another opportunity for challenge and refinement. In the virtual drought held in Seattle, six challenges were made to the model's verity, but in each case, discussions within the group showed that the challenger was wrong, and the model right.

Data conflicts are at the heart of the kinds of processes that are often stymied by an inability to agree on water management plans. The ability of stakeholders in a planning process to enter, display and manipulate data as a team provides a powerful incentive to move forward in problem solving. To the extent that knowledge is power, allowing stakeholders to access system models directly can re-balance water policy dialogue.

And the problem of "who has expert status?" is also quickly solved, because all stakeholders sitting in teams at the computer have equal status as "expert" generators, repositories and manipulators of shared information.

Once participants in the planning process come to the table and agree on a common goal to enter the process and move toward solutions, the work of negotiation begins. At this stage, the workshop facilitator assists stakeholders in defining problems and laying out issues, as they work together at computer terminals, playing "what if..." games and exploring scenarios. As mentioned above, workshop participants are all working from the same database (what the dispute resolution professionals call "single text negotiations"), generating, refining, testing out, and narrowing the issues.

The workshop facilitator will begin to move participants in the negotiations toward a hard look at the basic interests and values that underlie the stated issues. Many of these interests are "non-negotiable", for example retention of present infrastructure for water management (reservoir), even when an issue may have arisen suggesting the benefit of a change in infrastructure. But the shared vision model anchors the possibility of finding common ground. Options are generated more quickly, and the evaluation of those options takes place almost instantaneously with the shared vision model.